No. 6480

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE A. MARTINEZ,
Appellant,

v.

JOHN D. NAGLE, as Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

On August 10, 1929, George G. Martinez, appellant herein, a native and subject of Mexico, pleaded guilty as charged, in the District Court of the Southern Division of the Northern District of California, to an indictment (No. 20964-L) in two counts. The first count charged a violation of the Harrison Narcotic Act (26 U. S. C. 692, 705). The second charged a violation of the Jones-Miller Act (21 U. S. C. 174).

The court passed judgment and sentence upon the appellant as follows:

> "It Is Therefore Ordered and Adjudged that the said George G. Martinez of the Indictment be imprisoned for the period of One (1) Year and One (1) Day in a United States Penitentiary, and pay a fine in the sum of one (1) dollar. Further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law." (Resp. Exhibit A, p. 9.)

He was ordered deported by the Secretary of Labor on the 16th day of April, 1930. The order of deportation recites that he is ordered deported under

> "The Act of February 9, 1909, as amended by the Act of May 26, 1922, in that he is an alien that has been convicted under Subdivision C, Section 2 thereof." (Resp. Exhibit A, page 25.)

Having been taken into custody by the Immigration Authorities, he petitioned the District Court for a writ of habeas corpus, which petition was denied.

It is from the order of the District Court denying the petition for the writ of habeas corpus, that this appeal is taken.

THE LAW.

Section 2 of the Act of February 9, 1909, as amended by the Act of May 26, 1922, referred to in the order of deportation mentioned above, provides as follows:

"Sec. 2. (c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000. *and* imprisoned for not more than ten years. (21 U. S. C. 174)."

"(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the act of February 5, 1917, entitled 'An act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' or provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. (21 U. S. C. 175)."

The government does not contend that the alien would be liable to deportation because of the sentence for violation of the Harrison Narcotic Law alone, under the law as it existed at the time of such sentence.

United States ex rel. Andreacchi v. Curran, 38 Fed. (2d) 498.

The government does contend that appellant is liable to deportation because the sentence imposed was a

sentence for one year or more under the Jones-Miller Act.

The government concedes that the sentence under the Jones-Miller Act must be for at least one year before the alien is liable to deportation.

Chung Que Fong v. Nagle, (C. C. A. 9) 15 Fed. (2d) 789;

Weedin v. Moy Fat, (C. C. A. 9) 8 Fed. (2d) 488;

Charlie Gib v. Weedin, (C. C. A. 9) 8 Fed. (2d) 489; certiorari denied 271 U. S. 667;

U. S. ex rel., Grimaldi v. Ebey, (C. C. A. 7) 12 Fed. (2d) 922;

Hachiji Shibata v. Tillinghast, (D. C. Mass.) 31 Fed. (2d) 801.

THE ISSUE.

The sole issue presented to this court upon this appeal is to interpret the judgment of the District Court sentencing the appellant to a year and a day and $1.00.

The question is

Has appellant been sentenced to imprisonment for a year or more for violation of the Jones-Miller Act?

ARGUMENT.

An examination of appellant's opening brief discloses that the question as above stated is more favor-

able to him than as phrased by himself in his opening brief. (Appellant's Opening Brief, p. 3.)

The record shows that appellant pleaded guilty to the indictment. It is true the judgment does not show the sentence on particular counts, but merely shows a sentence of a year and one day and a fine of $1.00.

HOW IS THIS SENTENCE TO BE INTERPRETED?

The sentence of the District Court is susceptible of four possible interpretations.

(1) The sentence consists in a total or aggregate sentence of shorter jail terms and a total of smaller fines on each of the two counts.

This is apparently what appellant means when he uses the expression "aggregate sentence". This theory is not sustainable. The defendant could not have been sentenced to a penitentiary unless the sentence exceeded one year.

Mitchell v. United States, (C. C. A. 9) 196 Fed. 874, certiorari denied 266 U. S. 611.

Separate sentences of not more than one year each, but of more than one year in the aggregate, to be served in the penitentiary, would be void.

In re Mills, 135 U. S. 263, at 270.

(2) The sentence of a year and a day imprisonment runs to the first count and the fine of $1.00 to the second count.

This seems to be the interpretation contended for by the appellant. (Appellant's Opening Brief, pp. 4 and

5.) The Harrison Narcotic Act provides for the penalty in the *disjunctive.* "Imprisonment or fine or both." The Jones-Miller Act provides for the penalty in the *conjunctive* "Imprisonment *and* fine." If appellant were sentenced on the second count at all, he must have been sentenced to both fine *and* imprisonment. The presumption of judicial regularity referred to by appellant is opposed to any other interpretation.

(3) The appellant was sentenced on only one of two counts and it does not appear on which count he was sentenced.

The presumption of judicial regularity which appellant stresses at pages 4 and 5 in his opening brief, would prohibit this interpretation, which would necessitate holding that no sentence at all was imposed upon a count to which the defendant had pleaded guilty and which had not been dismissed.

Furthermore, as a complete answer to this contention, it is only necessary to point out that if this judgment were void as to either of these two counts, the sentence would stand in its entirety as to the other count.

Claassen v. United States, 142 U. S. 140.

The sentence therefore, must necessarily run to each count in the indictment.

(4) The sentence is a concurrent sentence of one year and one day and a fine of $1.00 on each of the two counts.

This is the interpretation for which appellee contends here.

> "Where sentences are imposed on verdicts of guilty or pleas of guilty on several indictments, or

on several counts of the same indictment, in the same court, each sentence begins to run at once and all run concurrently, in the absence of some definite specific provision that the sentences shall run consecutively, specifying the order of sequence."

Puccinelli v. United States, 5 Fed. (2d) 6 (C. C. A. 9);

United States v. Patterson, (C. C.) 29 F. (2d) 775;

Daugherty v. United States, (C. C. A.) 2 F. (2d) 691.

"And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

Claassen v. United States, 142 U. S. 140, at 146 and 147;

Locke v. United States, 7 Cranch 339-344;

Clifton v. United States, 4 How. 242, 250;

Snyder v. United States, 112 U. S. 216;

Bond v. Dustin, 112 U. S. 604, 609;

1 *Bishop Crim. Pro.,* Sec. 1015;

Wharton Criminal Pleading & Practice, Section 771.

It therefore, necessarily follows that this sentence must run to each count of the indictment because if either of the counts were void, the sentence would stand in its entirety as to the remaining count.

Appellee is satisfied that here is the answer to the question presented to this court.

The two authorities cited by appellant in his opening brief (Appellant's Opening Brief, pp. 4 and 5) are not in point and of no assistance to the court here.

United States v. Peake, 153 Fed. 166,

simply holds that

> "Where a defendant has been convicted on different counts of an indictment and the court imposes a single sentence on any count for a term longer than is authorized by the statute for one offense, the sentence is void to the extent of excess."

Brinkman v. Morgan, 253 Fed. 533,

simply holds:

> "Where a defendant pleads guilty to an indictment charging various offenses carrying maximum penalty of five years for each offense, the sentence of ten years to run concurrently on all counts is valid."

The case is helpful however, to this extent, that it defines the word "concurrently".

> "It is true that the word 'concurrently' is generally used when terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate

that while the convicted prisoner is serving one he is serving all. When so used, the sentence is the opposite of cumulative. But that use is not exclusive. Concurrently is also defined as 'in combination or unity'. When found in a sentence like that before us, the reasonable construction is that the years of imprisonment specified run as a unit upon all the counts in the indictment; that is to say, not upon each of the counts severally, but all of them in the aggregate."

Brinkman v. Morgan, 253 F. at 554.

It is significant that the District Court denied the petition for writ of habeas corpus. Is this not tantamount to an expression of the intention of that court as to what sentence was intended to be imposed by it?

"The prior history of this case—a first sentence, a decision in habeas corpus, and then the present sentence—indicates that the above was intended by the court in which the appellant was tried."

Brinkman v. Morgan, at 555, cited by appellant in his opening brief.

To hold what is contended for by appellant here would in effect be to permit a mere clerical error to defeat the intention of the District Court impliedly expressed in its denial of the petition for the writ of habeas corpus.

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